

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

LRB

Insert A

(H) This bill requires the party seeking ~~an~~ an
 out-of-home ^{care} placement of an Indian child in a CHIPS
 or JIPS ^{proceeding} proceeding or seeking an involuntary TPR to an
 Indian child to notify by certified mail, return ~~to~~
 receipt requested, the Indian child's parent, Indian
 custodian, and tribe of the first hearing of the
 proceedings. The bill requires similar notice to those
 persons of a change-in-placement proceeding that would
 remove the Indian child from the home of his or
 her parent or Indian custodian. For subsequent
 hearings in a proceeding, notice may be ~~made~~ ^{provided} by
 mail, personal delivery, or facsimile transmission,
 but not by electronic mail.

Out of state

**2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0150/1ins
GMM.....

(INSERT 26-19)

(bm) *Temporary physical custody; preferences.* Any Indian child who is being held in temporary physical custody under s. 48.205 (1) shall be placed in compliance with par. (b) or, if applicable, par. (c), unless the person responsible for determining the placement finds good cause, as described in par. (e), for departing from the order of placement preference under par. (b) or finds that emergency conditions necessitate departing from that order. When the reason for departing from that order is resolved, the Indian child shall be placed in compliance with the order of placement preference under par. (b) or, if applicable, par. (c).

(END OF INSERT)

(INSERT 35-2)

SECTION ~~48.207~~ 48.207 (1g) of the statutes is created to read:

48.207 (1g) An Indian child held in physical custody under s. 48.205 (1) shall be placed in compliance with s. 48.028 (7) (b) or, if applicable, s. 48.028 (7) (c), unless the person responsible for determining the placement finds good cause, as described in s. 48.028 (7) (e), for departing from the order of placement preference under s. 48.028 (7) (b) or finds that emergency conditions necessitate departing from that order. When the reason for departing from that order is resolved, the Indian child shall be placed in compliance with the order of placement preference under s. 48.028 (7) (b) or, if applicable, s. 48.028 (7) (c).

(END OF INSERT)

(INSERT 37-14)

SECTION ~~48.23~~ 48.23 (3) of the statutes is amended to read:

48.23 (3) POWER OF THE COURT TO APPOINT COUNSEL. Except in proceedings under s. 48.13, at any time, upon request or on its own motion, the court may appoint counsel for the child or any party, unless the child or the party has or wishes to retain counsel of his or her own choosing. The Except as provided in sub. (2g), the court may not appoint counsel for any party other than the child in a proceeding under s. 48.13.

History: 1977 c. 354, 355, 447, 449; 1979 c. 300, 356; 1987 a. 27; 1987 a. 383; 1989 a. 31; Sup. Ct. Order, 151 Wis. 2d xxv (1989); 1989 a. 56, 107; 1991 a. 263; 1993 a. 377, 385, 395, 451, 491; 1995 a. 27, 77; 1997 a. 292; 1999 a. 9, 149; 2001 a. 103; 2005 a. 344.

(END OF INSERT)

(INSERT 47-20)

SECTION ~~48~~ 48.32 (1) (d) of the statutes is created to read:

48.32 (1) (d) 1. In the case of an Indian child, if at the time the consent decree is entered into the Indian child is placed outside the home of his or her parent or Indian custodian under a voluntary agreement under s. 48.63[↓] or is otherwise living outside that home without a court order and if the consent decree maintains the Indian child in that placement or other living arrangement, the consent decree shall include a finding supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child under s. 48.028 (4) (d) 1.[↓] and a finding as to whether the county department, department in a county having a population of 500,000 or more, or agency primarily responsible for providing services to the child has made active efforts under s. 48.028 (4) (d) 2. to prevent the breakup of the Indian family[↓] and that those efforts have proved unsuccessful. The findings under this subdivision shall be in addition to the findings under par. (b) 1.[↓], except that for the sole purpose of determining whether the cost of providing care for an Indian child is eligible for

reimbursement under 42 USC 670 to 679b, the findings under this subdivision and the findings under par. (b) 1. shall be considered to be the same findings.

2. If the placement or other living arrangement under subd. 1. departs from the order of placement preference under s. 48.028 (7) (b) or, if applicable, s. 48.028 (7) (c), the court shall also find good cause, as described in s. 48.028 (7) (e), for departing from that order.

(END OF INSERT)

(INSERT 50-15)

~~SECTION 48.355~~ (2) (d) of the statutes is amended to read:

48.355 (2) (d) The court shall provide a copy of a dispositional order relating to a child in need of protection or services to the child's parent, guardian, legal custodian, or trustee, to the child through the child's counsel or guardian ad litem and, to the child's court-appointed special advocate, and, if the child is an Indian child who has been removed from the home of his or her parent or Indian custodian and placed outside that home, to the Indian child's Indian custodian and tribe. The court shall provide a copy of a dispositional order relating to an unborn child in need of protection or services to the expectant mother, to the unborn child through the unborn child's guardian ad litem and, if the expectant mother is a child, to her, to the parent, guardian, legal custodian, or trustee of a child expectant mother and, if the expectant mother is an Indian child, to the expectant mother's Indian custodian and tribe.

History: 1977 c. 354; 1979 c. 295, 300, 359; 1983 a. 27, 102, 399, 538; 1985 a. 29; 1987 a. 27, 339, 383; 1989 a. 31, 41, 86, 107, 121, 359; 1991 a. 39; 1993 a. 98, 334, 377, 385, 395, 446, 481, 491; 1995 a. 27, 77, 201, 225, 275; 1997 a. 27, 205, 237, 292; 1999 a. 9, 103, 149, 186; 2001 a. 2, 16, 109; 2005 a. 277; 2007 a. 20, 116.

(END OF INSERT)

(INSERT 88-19)

SECTION ~~48.63~~ 48.63 (3) (b) 1. of the statutes is amended to read:

48.63 (3) (b) 1. At the request of a parent having custody of a child and the proposed adoptive parent or parents of the child, the department, a county department under s. 48.57 (1) (e) or (hm), or a child welfare agency licensed under s. 48.60 may place the child in the home of the proposed adoptive parent or parents prior to termination of parental rights to the child as provided in subd. 2. or 3., whichever is applicable, and subd. 4. In placing an Indian child for adoption under this subdivision, the department, county department, or child welfare agency shall comply with the order of placement preference under s. 48.028 (7) (a) or, if applicable, s. 48.028 (7) (c), unless the department, county department, or child welfare agency finds good cause, as described in s. 48.28 (7) (e), for departing from that order.

History: 1977 c. 354, 449; 1979 c. 300; 1981 c. 81; 1983 a. 351, 399; 1985 a. 176; 1989 a. 31, 107; 1993 a. 446; 1995 a. 27 ss. 2594, 9126 (19); 1995 a. 77; 2001 a. 69, 109; 2007 a. 20, 186, 199.

(END OF INSERT)

(INSERT 100-13)

SECTION ~~48.833~~ 48.833 (3) of the statutes is created to read:

48.833 (3) (d) In placing an Indian child for adoption under sub. (1) or (2), the department, county department, or child welfare agency shall comply with the order of placement preference under s. 48.028 (7) (a) or, if applicable, s. 48.028 (7) (c), unless the department, county department, or child welfare agency finds good cause, as described in s. 48.28 (7) (e), for departing from that order.

(END OF INSERT)

(INSERT 101-10)

SECTION ~~48.837~~ 48.837 (1r) (a) of the statutes is amended to read:

48.837 (1r) (a) At the request of a parent having custody of a child and the proposed adoptive parent or parents of the child, the department, a county

department under s. 48.57 (1) (e) or (hm), or a child welfare agency licensed under s. 48.60 may place the child in the home of the proposed adoptive parent or parents prior to the filing of a petition under sub. (2) as provided in par. (b) or (c), whichever is applicable, and par. (d). In placing an Indian child for adoption under this paragraph, the department, county department, or child welfare agency shall comply with the order of placement preference under s. 48.028 (7) (a) or, if applicable, s. 48.028 (7) (c), unless the department, county department, or child welfare agency finds good cause, as described in s. ^{48.028} ~~48.28~~ (7) (e), for departing from that order.

History: 1981 c. 81; 1985 a. 176; 1989 a. 161; 1993 a. 446; 1997 a. 27, 104, 191; 2005 a. 293; 2005 a. 443 s. 265; 2007 a. 96, 186.

SECTION ~~48~~ 48.837 (4) (d) of the statutes is amended to read:

48.837 (4) (d) May, in the case of a child who has not been placed under sub. (1r), order the department or a county department under s. 48.57 (1) (e) or (hm), at the request of a petitioning parent or on its own motion after ordering the child taken into custody under s. 48.19 (1) (c), to place the child, pending the hearing on the petition, in any home in this state that is licensed under s. 48.62 or in any home outside this state if the conditions under sub. (1r) (c) are met. In placing an Indian child for adoption under this paragraph, the department or county department shall comply with the order of placement preference under s. 48.028 (7) (a) or, if applicable, s. 48.028 (7) (c), unless the department, county department, or child welfare agency finds good cause, as described in s. ^{48.028} ~~48.28~~ (7) (e), for departing from that order.

History: 1981 c. 81; 1985 a. 176; 1989 a. 161; 1993 a. 446; 1997 a. 27, 104, 191; 2005 a. 293; 2005 a. 443 s. 265; 2007 a. 96, 186.

(END OF INSERT)

(INSERT 113-13)

SECTION ~~93~~ 938.02 (15c) of the statutes is amended to read:

Strike
Scored comma + close quote

938.02 (15c) "Reservation" ~~except as otherwise provided in s. 938.028 (2) (e).~~ ✓

means land in this state within the boundaries of the reservation of a tribe.

History: 1995 a. 77, 216, 352, 448; 1997 a. 27, 35, 181, 191; 1999 a. 9, 162; 2001 a. 16, 59; 2003 a. 33, 284; 2005 a. 232, 344, 387; 2005 a. 443 s. 265; 2007 a. 20 ss. 3780 to 3782, 9121 (6) (a).

(END OF INSERT)

(INSERT 122-10)

(am) *Temporary physical custody; preferences.* Any Indian juvenile in need of protection or services under s. 938.13 (4), (6), (6m), or (7) who is being held in temporary physical custody under s. 938.205 (1) shall be placed in compliance with par. (a) or, if applicable, par. (b), unless the person responsible for determining the placement finds good cause, as described in par. (d), for departing from the order of placement preference under par. (a) or finds that emergency conditions necessitate departing from that order. When the reason for departing from that order is resolved, the Indian juvenile shall be placed in compliance with the order of placement preference under par. (a) or, if applicable, par. (b).

(END OF INSERT)

(INSERT 128-14)

SECTION ~~11~~ 938.207 (1g) of the statutes is created to read:

938.207 (1g) INDIAN JUVENILE; PLACEMENT PREFERENCES. An Indian juvenile in need of protection or services under s. 938.13 (4), (6), (6m), or (7) who is held in physical custody under s. 938.205 (1) shall be placed in compliance with s. 938.028 (a) or, if applicable, s. 938.028 (b), unless the person responsible for determining the placement finds good cause, as described in s. 938.028 (d), for departing from the order of placement preference under s. 938.028 (a) or finds that emergency conditions necessitate departing from that order. When the reason for

departing from that order is resolved, the Indian juvenile shall be placed in compliance with the order of placement preference under s. 938.028 ⁶(~~7~~) (a) or, if applicable, s. 938.028 ⁶(~~7~~) (b).✓

(END OF INSERT)

(INSERT 130-20)

SECTION ~~4~~ 938.23 (3) of the statutes is amended to read:

938.23 (3) POWER OF THE COURT TO APPOINT COUNSEL. Except as provided in this subsection, at any time, upon request or on its own motion, the court may appoint counsel for the juvenile or any party, unless the juvenile or the party has or wishes to retain counsel of his or her own choosing. The Except as provided in sub. (2g), the court may not appoint counsel for any party other than the juvenile in a proceeding under s. 938.13.

History: 1995 a. 77; 1999 a. 9; 2001 a. 103; 2005 a. 344.

(END OF INSERT)

(INSERT 141-12)

SECTION ~~4~~ 938.32 (1) (e) of the statutes is created to read:

938.32 (1) (e) 1. In the case of an Indian juvenile who is the subject of a proceeding under s. 938.13 (4), (6), (6m), or (7), if at the time the consent decree is entered into the Indian juvenile is placed outside the home of his or her parent or Indian custodian under a voluntary agreement under s. 48.63 or is otherwise living outside that home without a court order and if the consent decree maintains the Indian juvenile in that placement or other living arrangement, the consent decree shall include a finding supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the

Indian juvenile by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child under s. 938.028 (4) (d) 1. and a finding as to whether the county department or agency primarily responsible for providing services to the juvenile has made active efforts under s. 938.028 (4) (d) 2. to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. The findings under this subdivision shall be in addition to the findings under par. (c) 1., except that for the sole purpose of determining whether the cost of providing care for an Indian juvenile is eligible for reimbursement under 42 USC 670 to 679b, the findings under this subdivision and the findings under par. (c) 1. shall be considered to be the same findings.

2. If the placement or other living arrangement under subd. 1. departs from the order of placement preference under s. 938.028 (6) (a) or, if applicable, s. 938.028 (6) (b), the court shall also find good cause, as described in s. 938.028 (6) (d), for departing from that order.

(END OF INSERT)

(INSERT 143-24)

SECTION ~~13~~ 938.355 (2) (d) of the statutes is amended to read:

938.355 (2) (d) The court shall provide a copy of the dispositional order to the juvenile's parent, guardian, legal custodian, or trustee and, if the juvenile is an Indian juvenile who has been removed from the home of his or her parent or Indian custodian and placed outside that home under s. 938.13 (4), (6), (6m), or (7), to the Indian juvenile's Indian custodian and tribe.

Malaise, Gordon

From: Mitchell, Mark S - DCF [Mark.Mitchell@wisconsin.gov]
Sent: Monday, September 29, 2008 11:19 AM
To: Adams, Andrew; Arnold, Eric; Bachir, Julie S - DCF; Blackdeer, Valerie; Botsford, James; Boyd, Chris; Campbell, Mark D - DCF; Churchill, Donna; Corn, Carol; Cunningham, Bridget E - COURTS (Bauman); Day, Jean (jean.day@ho-chunk.com); Durkin, Therese A - DCF; Fletcher, Adrienne; Goodwill, Kris; Grzelak, Carolyn; Holmes, Rea L - DHFS; Hoyt, Terry; Husby, Mary; James, Mary; Jensen Goodwin, Michelle M - COURTS; Kiel, Joyce; Klick, Connie L - DCF; Kolumbus, Luanne; Long, Caroyl; Madosh-Smart, Jan; Malaise, Gordon; Martin, Karen; Milham, Sonya; Mitchell, Mark S - DCF; Orcutt, Rob; Paul, June C - DCF; Plona, Katie P - DHFS; Porter, Loa L - DCF; Puzz, Dennis; Randall, Lorrie; Ring, Angela; Russell, Angela R - DCF; Sappenfield, Anne; Skenandore, George; Stone, Gerri; Strohl, Joe; Swanke, Bridget; Tousey, Rhonda; Ujke, Dave; Weber, James A - DHFS; Wettersten, Nancy C - DCF; Wilhelmi, John
Cc: Hines, Janel M - DCF
Attachments: Workgroup re Draft 2, msm, 09-27-08.doc; Incorporated into Ch 48, Draft 8, 0150-1, 09-27-08.rtf



Workgroup re Draft Incorporated into
2, msm, 09-... Ch 48, Draft...

Greetings, everyone. Please see the attached memo and the attached revised Ch. 48 with the changes from the new bill incorporated (it is 183 pages long).

--Mark

Mark S. Mitchell
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Department of Children and Families
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mark.mitchell@wisconsin.gov

Jim Doyle
Governor

Reggie Bicha
Secretary



State of Wisconsin
Department of Children and Families

OFFICE OF LEGAL COUNSEL
201 East Washington Avenue, Room G200
P.O. Box 8916
Madison, WI 53708-8916

Telephone: 608-266-8684
Fax: 608-261-6972
dcf.wisconsin.gov

Date: September 29, 2008

To: ICWA Codification Workgroup

From: Mark Mitchell
Office of Legal Counsel









Re: Draft #5 (Draft #1) of ICWA Bill (LRB—0150/1)

Greetings, everyone. This is a follow-up to my memo from a week ago. I have included a few additional notes regarding minor changes that are needed in the current draft. Please let me know if you find any additional items. Clearly, Gordon did a great job incorporating our, at times, complex changes.

Accompanying this memo in this e-mail is a copy of Ch. 48 with this draft incorporated. Please let me know if you see any typos or other errors in that document as well.

Notes:

- We requested a definition of “certified mail” but I don’t find it. It is possible that it was not defined because it is a service of the Post Office and not a legal term.
- / Page 13, Line 18: 26 should be 25
- / Page 14, Line 4: 26 should be 25
- / Page 16, Line 14: Insert “child” after “Indian”
- / Page 22, Line 23: Insert “child” after “Indian”
- / Page 23, Line 21: “Arrangement” should be “Arrangements”
 - Page 24, Line 3: There was a suggestion that we add the term “available” before “family.” We just need to determine what we want to do.
 - Page 24, Line 4: The draft uses the term “employed.” We had talked about “exhausted,” “considered,” etc. We just need to make a final decision.
- / Page 28, Line 14: 26 should be 25
- / Page 31, Line 2: 1911 should be 1901
- / Page 35, Beginning on Line 20: This is new language that gets at our concern regarding placement preferences in emergency situations.
- / Page 38, Line 14: There should be a comma after “placement”
- / Page 38, Lines 18-22: This is new language that doesn’t change anything; it just further clarifies the language re: right to counsel.
- / Page 40, Lines 5 and 21: 1911 should be 1901
- / Page 42, Line 23: 49.133 should be 48.133
- / Page 44, Line 14: There should be a comma at the end of the line
- / Page 47, Line 7: There should be a comma after “guardian”
- / Page 64, Line 19: There should be a comma after “treatment foster parent”

-  Page 69, Line 5: The first "or" should be "of".
-  Page 73, Line 19: 1911 should be 1901
-  Page 83, Line 2: "Indian" should not be underlined
-  Page 83, Line 4: 1911 should be 1901
-  Page 89, Lines 6-17 (in Draft 4, Pages 88-89, Lines 20-25 and 1-7): We had suggested that this paragraph be removed. Gordon left it in but changed the language a bit. In retrospect, I'm not sure why we suggested that it be removed.
-  Page 104, Line 5: 1911 should be 1901
-  Page 105, Line 12: 1911 should be 1901
-  We had suggested that all of the changes to s. 48.981 be removed from the draft. Gordon took a lot of it out, but left some in. It is my assumption that he did this because these are necessary clarifications and should not wait until we separately make revisions to s. 48.981.

I look forward to seeing you all in the near future.

c: Janel Hines, SO
Gordon Malaise, LRB
Nancy Wettersten, OLC

Malaise, Gordon

From: Mitchell, Mark S - DCF [Mark.Mitchell@wisconsin.gov]
Sent: Thursday, October 30, 2008 5:22 PM
To: Adams, Andrew; Arnold, Eric; Bachir, Julie S - DCF; Behroozi, Cyrus A - DCF; Blackdeer, Valerie; Botsford, James; Boyd, Chris; Campbell, Mark D - DCF; Churchill, Donna; Collins, Kimmie L - DCF; Corn, Carol; Cunningham, Bridget E - COURTS (Bauman); Day, Jean (jean.day@ho-chunk.com); Durkin, Therese A - DCF; Goodwill, Kris; Grzelak, Carolyn; Holmes, Rea L - DHS; Hoyt, Terry; Husby, Mary; James, Mary; Jensen Goodwin, Michelle M - COURTS; Kiel, Joyce; Klick, Connie L - DCF; Kolumbus, Luanne; Long, Caroyl; Madosh-Smart, Jan; Malaise, Gordon; Martin, Karen; Milham, Sonya; Mitchell, Mark S - DCF; Orcutt, Rob; Plona, Katie P - DHS; Porter, Loa L - DCF; Puzz, Dennis; Randall, Lorrie; Ring, Angela; Russell, Angela R - DCF; Sappenfield, Anne; Skenandore, George; Stone, Gerri; Strohl, Joe; Swanke, Bridget; Tousey, Rhonda; Ujke, Dave; Weber, James A - DHS; Wettersten, Nancy C - DCF; Wilhelmi, John
Subject: FW:

Hi, again. Below you will find the e-mail message from Gordon Malaise that I referred to at the meeting on Tuesday. These are Gordon's comments on the three more substantive items in the comments I had sent to him on the most recent draft of the bill in my memo dated September 29.

--Mark

Mark S. Mitchell
Office of Legal Counsel
Department of Children and Families
201 East Washington Avenue
P.O. Box 8916
Madison, WI 53708-8916
Phone: (608) 264-9836
FAX: (608) 266-8620
mark.mitchell@wisconsin.gov

-----Original Message-----

From: Malaise, Gordon [mailto:Gordon.Malaise@legis.wisconsin.gov]
Sent: Thursday, October 02, 2008 1:46 PM
To: Mitchell, Mark S - DCF
Subject: RE:

Mark:

The changes set forth in your memo are all good changes that can easily be incorporated into a redraft along with any other changes that the group or anybody else has.

To address the three substantive questions you have about the draft:

1. No definition of "certified mail" is necessary. It is a common, well-understood term that is not susceptible to varying interpretations. Indeed, there are 230 hits of "certified mail" in the Wisconsin statutes and nowhere it is defined. Moreover, the real substantive language in your proposed definition, i.e., "return receipt requested," is inserted after "certified mail" wherever found in the draft.

2. In s. 48.63 (4), this draft differs from the previous draft in that the previous draft required a copy of the permanency plan to be provided to the Indian child's tribe. The committee determined, however, that the tribe is not involved in a voluntary placement. The child's Indian custodian could still place the child voluntarily, so 25 USC 1913 (a), as codified in s. 48.028 (5) (a), would still apply.

3. This draft removes all the substantive changes from s. 48.981, but still amends certain provisions of s. 48.981 to conform certain terms that are defined in s. 48.02, as

affected by this draft. Specifically, "Indian tribe" replaces "Indian tribe or band" because "Indian tribe" is defined for purposes of all of ch. 48 in s. 48.02 (8r). On further review, current law saying "federally recognized Indian reservation" in s. 48.981 (3) (bm) (intro.) should be restored because the definition of "reservation," which was in s. 48.02 in the previous draft, has been moved to s. 48.028 so that it will only apply for purposes of ICWA.

Gordon

-----Original Message-----

From: Mitchell, Mark S - DCF [mailto:Mark.Mitchell@wisconsin.gov]

Sent: Monday, September 29, 2008 11:19 AM

To: Adams, Andrew; Arnold, Eric; Bachir, Julie S - DCF; Blackdeer, Valerie; Botsford, James; Boyd, Chris; Campbell, Mark D - DCF; Churchill, Donna; Corn, Carol; Cunningham, Bridget E - COURTS (Bauman); Day, Jean (jean.day@ho-chunk.com); Durkin, Therese A - DCF; Fletcher, Adrienne; Goodwill, Kris; Grzelak, Carolyn; Holmes, Rea L - DHFS; Hoyt, Terry; Husby, Mary; James, Mary; Jensen Goodwin, Michelle M - COURTS; Kiel, Joyce; Klick, Connie L - DCF; Kolumbus, Luanne; Long, Caroyl; Madosh-Smart, Jan; Malaise, Gordon; Martin, Karen; Milham, Sonya; Mitchell, Mark S - DCF; Orcutt, Rob; Paul, June C - DCF; Plona, Katie P - DHFS; Porter, Loa L - DCF; Puzz, Dennis; Randall, Lorrie; Ring, Angela; Russell, Angela R - DCF; Sappenfield, Anne; Skenandore, George; Stone, Gerri; Strohl, Joe; Swanke, Bridget; Tousey, Rhonda; Ujke, Dave; Weber, James A - DHFS; Wettersten, Nancy C - DCF; Wilhelmi, John

Cc: Hines, Janel M - DCF

Subject:

Greetings, everyone. Please see the attached memo and the attached revised Ch. 48 with the changes from the new bill incorporated (it is 183 pages long).

--Mark

Mark S. Mitchell
Office of Legal Counsel
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ICWA CODIFICATION WORKGROUP

Jefferson Inn, Wausau WI

March 4, 2009

10:00 AM to 4:00 PM

A. Welcome and Introductions

B. Decision Items

- ~~1.~~ Withdrawal of Consent
- ~~2.~~ Definition of Parent
- ~~3.~~ Active Efforts (see attached draft language)
- ~~4.~~ Good Cause Not to Transfer
- ~~5.~~ Fact-Finding vs. Dispositional Hearing & QEW
- ~~6.~~ Qualified Expert Witness
- ~~7.~~ Administrative Rule (see attached e-mail from Henry Plum)
- ~~8.~~ Notification: Certified vs. Registered Mail (see attached e-mail from Joyce Kiel)
- ~~9.~~ Existing Indian Family Doctrine
- ~~10.~~ Active Efforts Not Required
- ~~11.~~ "Best Int" definition

C. Next Steps

Summary of the Negotiations with Stakeholders Indian Child Welfare Act Codification Bill

Two meetings were held by the Negotiation Team with stakeholders who had expressed interest in the bill and who had suggestions for changes to the bill. The first meeting was held on January 7, 2009 and the second on February 2, 2009.

Stakeholder groups represented at the meetings included the Children and the Law Section of the State Bar of Wisconsin, the Wisconsin Counties Association, the Wisconsin County Human Services Association, the Office of the Milwaukee County District Attorney, the Wisconsin Association of Corporate Counsels, and the Office of the State Public Defender.

A summary of the issues discussed and the decisions needed by the Codification Workgroup are found below.

Withdrawal of Consent

Concern was expressed regarding this issue in terms of a child being returned to the Indian parent upon a withdrawal of consent. There are two situations in which this could occur. The first is cited in § 1913(c) of ICWA and allows a parent to withdraw his or her consent, for any reason, to a voluntary termination of parental rights or adoptive placement of an Indian child up to the entry of a final decree of termination or adoptive placement. The second situation is cited in § 1913(d) and allows a parent to withdraw a consent to an adoption for up to two years after the final decree of adoption if the parent can prove that fraud or duress were involved in his or her decision to consent to the adoption. In both situations, the child must be returned to the parent.

Stakeholders expressed concern that such situations could result in a child being returned to an unsafe home. The Codification Workgroup certainly shares this concern. Options discussed included the creation of language that would differentiate between a truly voluntary termination of parental rights and a voluntary termination of parental rights that occurs subsequent to filing of a petition to involuntarily terminate the parent's rights. Other options include, especially in the first instance, maintaining any CHIPS order until the point that the adoption is finalized or allowing jurisdiction to be reinstituted based on the grounds of a CHIPS order that was vacated or allowed to expire prior to the finalization of the adoption.

48.368(1)

Workgroup Decision Item

The following language was drafted and proposed by Chris Dee with the Milwaukee County District Attorney's Office:

unless s. 48.368(1) applies

Section 48.028(5)(b)---

[Amend the language in the proposed bill to read:]

(b) *Termination of Parental Rights.* A voluntary consent by a parent to a termination of parental rights under s. 48.41(2)(e) is not valid unless the consent is executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of the consent were fully explained in detail to and were fully understood by the parent. The judge shall also certify that the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understood. Any consent given under this paragraph prior to or within 10 days after the birth of the Indian child is not valid. A parent who has executed a consent under this paragraph may withdraw the consent for any reason at any time prior to the entry of a final order terminating parental rights, and the Indian child shall be returned to his or her parent. After the entry of a final order terminating parental

rights, a parent who has executed a consent under this paragraph may withdraw that consent as provided in par. (c), move to invalidate the termination of parental rights under sub. (6), or move for relief from judgment under s. 48.46(2). This paragraph does not apply to a voluntary consent by a parent during the course of a termination of parental rights action commenced by an involuntary petition by any party authorized to file such a petition pursuant to s. 48.09 and s. 48.235.

~o

Section 48.028(5)(bm)---

[Create the following language to read]:

(bm) Termination of Parental Rights: Involuntary Proceedings. A voluntary consent by a parent to a termination of parental rights under s. 48.41(2)(e) during the course of a termination of parental rights action commenced by an involuntary petition by any party authorized to file such a petition pursuant to s. 48.09 and s. 48.235 is not valid unless the consent is executed in writing, recorded before the judge, and accompanied by a written certification by the judge that the terms and consequences of the consent were fully explained in detail to and were fully understood by the parent. The judge shall also certify that the parent that the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understood. Any consent given under this paragraph prior to or within 10 days after the birth of the Indian child is not valid.

No

Sec. 48.41(2)(e)---

[Amend the language in the bill to read]:

(e) In the case of an Indian child, the consent is given as provided in s. 48.028(5)(b) and (bm).

Definition of Parent

Certain stakeholders had concerns about the definition included in the draft because it was believed that it "went beyond" ICWA and that the language was confusing. Part of the concern relates to how the language in ICWA was being read. The definition of Indian parent in ICWA [§1903(9)] is as follows: "'parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established; . . ." It appears as those some individuals were interpreting this to describe three distinct groups:

- any biological parent
- parents of an Indian child
- any Indian person who has lawfully adopted an Indian child

Another interpretation is that there are only two distinct groups:

- any biological parent or parents of an Indian child
- any Indian person who has lawfully adopted an Indian child

= Repeat ICWA definition, but not "or parents"
992001 singular = plural

Workgroup Decision Item

In order to resolve the interpretive issues, the Workgroup decided that the actual language in ICWA should be used in the bill, as suggested by certain stakeholders. The Codification Workgroup will consult with the drafter in the Legislative Reference Bureau to determine if this can be done pursuant to Wisconsin's statutory language procedures.

Active Efforts

Three concerns were expressed related to this topic. The first clarification was on whom or on which agency the burden of assuring that reasonable efforts are made to prevent the breakup of

active

the Indian family is placed. In the great majority of cases currently, it is the county that has this responsibility. The second concern was that the county, under the current language, could be held responsible for performing activities for which they have no authority (e.g., using tribal resources, especially traditional support services) or independent capacity (e.g., consulting with extended family when assistance from the Tribe is needed to identify those extended family members). The third concern was that "reasonable" efforts, as currently defined by state statute, represent "active" efforts and, therefore, reasonable and active are the same.

Regarding the first concern, the current draft reflects the language in the existing statutes relative to reasonable efforts, to wit: "When a court makes a finding under sub. (2)(b)6. as to whether the county department, the department, in a county having a population of 500,000 or more, or the agency primarily responsible for providing services to the child under a court order . . ." [Ref. s. 48.355(2c)(a)] [Note: In virtually all cases, the third option, the "agency primarily responsible," would be contracted with for that purpose by a county department or the Department.] The language in ICWA is somewhat broader, indicating that the making of active efforts is the responsibility of "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child . . ." [§1912(d)] Stakeholders indicated that they would prefer this language.

Regarding the second concern, the Workgroup has consulted with the Wisconsin County Human Services Association and revised the language to make it clear that a county (or other agency responsible for making active efforts) will not be held responsible for the provision of services or other matters that it does not have the authority or ability to provide (i.e., that could be provided only by a tribe).

Regarding the third concern, Congress, in enacting the Indian Child Welfare Act in 1978 and the Adoption Assistance and Child Welfare Act in 1980, used the different terms "active" and "reasonable," respectively. It must then be assumed that different standards were intended. In addition, the great majority of court cases make a clear distinction between reasonable and active efforts. States that have codified ICWA into their statutes also make a clear distinction.

Workgroup Decision Item - See active efforts markup attached

The Workgroup has agreed to make the changes suggested relative to the first two concerns. The Workgroup, however, does not agree with the third concern, especially given the fact that the purpose of active efforts is, as stated in the BIA Guidelines, "to alleviate the need to remove the Indian child from his or her parents or Indian custodian" in a manner that takes "into account the prevailing social and cultural conditions and way of life of the Indian child's tribe . . . and shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian caregivers." This is not reflected in reasonable efforts as currently defined in Ch. 48 or Ch. 938. A revision of the language, as discussed with the Wisconsin County Human Services Association, is attached.

Good Cause Not to Transfer

Under ICWA, any child custody proceeding in circuit court regarding an Indian child not domiciled or residing within the reservation of the Indian child shall be transferred to the tribal court unless:

- A parent objects;
- The tribal court declines jurisdiction; or
- The court finds that there is good cause to not transfer the case.

The BIA Guidelines, which are advisory, identifies five possible situations which might constitute good cause to not transfer the case:

- The child's tribe does not have a tribal court
- The proceeding was at an advanced stage
- The Indian child is over age 12 and objects to the transfer
- The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses
- The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe

Under the bill, good cause not to transfer is limited to consideration of hardships to the parties and witnesses. In addition, the bill moves the fact that there is no tribal court from a good cause issue to a mandatory consideration, for obvious reasons. Stakeholders suggested that the language in the BIA Guidelines be used, especially the advanced stage consideration.

Workgroup Decision Item

The Workgroup stands by its decision to limit good cause to the issue of hardship to the parties and witnesses. There is a long history, continuing up to this day, of significant failure to notify tribes when child custody proceedings in circuit court are held regarding Indian children. Notice is the critical factor in tribes being able to intervene in cases. The Workgroup did not include the child over age 12 because there are technical, legal, and jurisdictional issues involved in these decisions and it did not seem appropriate to make those issues dependent upon the decision of a 12-year old child. [Note: We did, however, maintain the ability of a child to provide input regarding the placement preferences since where the child will live is of much greater importance to the child.] The Workgroup also rejected the last BIA Guidelines factor because it would open the door to what the Workgroup is against in its position on the Existing Indian Family Doctrine.

The following language was drafted and proposed by Chris Dee:

Section 48.028(3)(c)3---

[Amend the language in the bill to read]:

3. The court determines that good cause exists to deny the transfer. Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists. The court may determine that good cause exists to deny the transfer only if the person opposing the transfer shows ~~to the satisfaction of the court that the~~ by clear, convincing, and satisfactory evidence that any of the following exist:

a. The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing. Actions filed pursuant to s. 48.25 and s. 48.42 shall be considered separate proceedings.

b. The Indian child is over 12 years of age and objects to the transfer.

c. The evidence or testimony necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses and that the tribal court is unable to mitigate the hardship by making arrangements to receive evidence or testimony by use of telephone or live audiovisual means, by hearing the evidence or testimony at a location that is convenient to the parties and witnesses, or by use of other means permissible under the tribal court's rules of evidence.

Fact-Finding Hearing v. Dispositional Hearing

This issue relates to when a qualified expert witness would testify and when it must be determined that active efforts were made. Stakeholders were concerned that the bill would have this occur at the fact-finding hearing rather than the dispositional hearing. Stakeholders believed

that this would be difficult in cases where the fact-finding was before a jury rather than a judge. In addition, there are different burdens of proof at this stage depending upon whether it is a CHIPS case or a termination of parental rights case.

The Workgroup indicated that this was a topic of significant discussion in the creation of the draft but that it was determined that the fact-finding hearing was most appropriate because, at least in the case of a termination of parental rights case involving continuing need of protection or services, information provided by a qualified expert witness would be critical in determining whether that particular ground for termination of parental rights was met. Determining whether the ground is met is part of fact-finding.

Stakeholders countered that for other grounds for terminations of parental rights, the information provided by a qualified expert witness goes to whether a termination of parent rights, even if the grounds exist, is in the best interest of a child. Determining whether to grant the termination is part of disposition.

Workgroup Decision Item

The following language was drafted and proposed by Chris Dee:

Section 48.028(4)(d)---

(d) *Out-of-home care placement; serious damage and active efforts.* The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in out-of-home care placement unless all of the following occur:

1. The court ~~or jury~~ finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses chosen in order of preference listed in par. (f), that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (No)

2. The court ~~or jury~~ finds by clear and convincing evidence that active efforts, as described in par. (g), have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. The court ~~or jury~~ shall make that finding notwithstanding that a circumstance specified in s. 48.355(2d)(b) 1. to 5. applies. (OK)

Section 48.028(4)(e)---

(e) *Involuntary termination of parental rights; serious damage and active efforts.* The court may not order an involuntary termination of parental rights to an Indian child unless all of the following occur:

1. The court ~~or jury~~ finds beyond a reasonable doubt, including the testimony of one or more qualified witnesses chosen in the order of preference listed in par. (f), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (No)

2. The court ~~or jury~~ finds by clear and convincing evidence that active efforts, as described in par. (g), have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. (OK)

Section 48.415---

[Eliminate the proposed changes to the bill so that the current language in s. 48.415 would remain (see below)]: (No)

At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following.

Section 48.424(1)---

[Amend the changes in the proposed bill to read]:

(1)(intro.) The purpose of the fact-finding hearing is to determine whether grounds exist for the termination of parental rights in those cases in which the petition for termination of parental rights was contested at the hearing on the petition under s. 48.422. (No)

[delete proposed 48.424(1)(b)]

Section 48.424(3)---

[Amend the changes in the proposed bill to read]:

(3) If the facts are determined by a jury, the jury may only decide whether any grounds for the termination of parental rights have been proven. The court shall decide what disposition is in the best interests of the child. (No)

Section 48.426(2m)---

[Create s. 48.426(2m) to read]:

(2m) *Standard for Indian children.* The best interests of the Indian child, which include the continued existence and integrity of the Indian child's tribe, shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter. (No)

Section 48.426(3)(g)---

[Create s. 48.426(3)(g) and (h) to read]:

(g) If the child is an Indian child, the court shall hear evidence and testimony and make findings consistent with those described in s. 48.028(4)(e)1. (No)

(h) If the child is an Indian child, the court shall hear evidence and testimony and make findings consistent with those described in s. 48.028(4)(e)2. (No)

Qualified Expert Witness

Stakeholders expressed concerns regarding the "power" of a qualified expert witness under the draft bill. In addition, stakeholders indicated that a tribe could "veto" the ability of a district attorney or other prosecutor to obtain a qualified expert witness from the first level since that person would have to be recognized by the child's tribe. A greater discussion of the issue indicated that the bill, or perhaps a subsequent administrative rule, could provide greater clarity on the primary factors that cause most of the concerns:

- The limited focus regarding the issues on which a qualified expert witness would testify (i.e., cultural issues)
- The ability of any party in the proceeding to utilize other expert witnesses - does not preclude
- The reality that tribal cultural practices and beliefs are not necessarily factors in why the child is being removed from the home

• The process for moving from one level of expert to another - May not choose from lower order unless diligent effort

Workgroup Decision Item

The Workgroup will consult with the Legislative Reference Bureau on the inclusion of language which provides greater clarity regarding the bulleted issues above. The following language was drafted and proposed by Chris Dee:

to call from higher order

Section 48.028(2)(g)---

[Amend the language in the bill to read]:

1. A member of the Indian child's tribe recognized by the Indian child's tribal community as knowledgeable regarding the tribe's customs relating to family organization or child-rearing practices.
2. A member of another tribe who is knowledgeable regarding the customs of the Indian child's tribe relating to family organization or child-rearing practices.
3. A professional person having substantial education and experience in the person's professional specialty and having substantial knowledge of the customs, traditions, and values of the Indian child's tribe relating to family organization and child-rearing practices.
4. A layperson having substantial experience in the delivery of child and family services to Indians and substantial knowledge of the prevailing social and cultural standards and child-rearing practices of the Indian child's tribe.
5. A professional person having substantial education and experience in the area of his or her specialty. (No)

Sec. 48.028(4)(f)---

[Amend the language in the bill to read]:

(f) *Qualified expert witness; order of preference.* 1. A qualified expert witness shall be chosen in the following order of preference:

- a. A member of the Indian child's tribe described in sub. (2)(g)1.
- b. A member of another tribe described in sub. (2)(g)2.
- c. A professional person described in sub. (2)(g)3.
- d. A layperson described in sub. (2)(g)4.
- e. A professional person described in sub. (2)(g)5.

Timeliness of Tribal Response to Notification

Stakeholders expressed concern regarding potential issues when a tribe does not respond to notice – particularly initial notice requesting information about the tribal affiliation of a child – in a timely manner.

Workgroup Decision Item

There really is no decision to make here. ICWA clearly indicates that notice must be provided to tribes and that tribes have ten days to respond, after which the proceedings may go forward. The overall issue relates to cooperation and a mutual desire to see the best interests of the Indian child, family, and tribe recognized. It has been the contention of the Workgroup all along that codification of ICWA provides the best opportunity for the state, counties, and tribes to work together to assure these values.

Administrative Rule

Some stakeholders expressed a concern that the bill requires the Department of Children and Families to create an administrative rule without some limitations on what those rule could contain. Specifically, the stakeholders indicated that the authority/mandate “could result in the creation of rules that go beyond the requirement of the current federal law. The rule making authority should be limited to current federal law and BIA guidelines and not exceed those requirements.” It should be noted here that the BIA Guidelines are not regulations and should not, therefore, be equated with ICWA itself or other regulations in terms of their requirements.

Delete

The discussion included a reference to s. 48.38(6), which requires the Department to create a rule related to reasonable efforts and permanency planning, which has no such limitation. To a certain extent, this is a continuation of the argument that the bill “goes beyond ICWA.” The Workgroup does not feel that the bill goes beyond ICWA any more than existing statutes “go beyond” the Adoption Assistance and Child Welfare Act by defining “reasonable efforts” as used, but not defined, in that Act. The stakeholders suggested the inclusion of language that would restrict the Department in terms of the content of the rule.

Workgroup Decision Item

The Workgroup expressed strong concerns to this limitation because it would hinder the Department's ability to implement the law since creating procedures or other policies could be seen by some to be “going beyond” the law. In addition, and from a more general perspective, this proposal was seen as intruding upon the existing procedure for the creation of administrative rules. The Workgroup believes that it would be best for the Department and tribes to identify where additional clarity or procedures are required and then determine how best to implement

them, whether by subsequent legislative change, the promulgation of an administrative rule, or the creation of Department policy.

Pending this ongoing analysis and in order to avoid any unintended consequences of limiting legislation, the Workgroup has decided to strike the mandate to create an administrative rule, as suggested by the stakeholders.

Notification: Certified vs. Registered Mail

The bill, as currently drafted, requires notice to tribes of child custody proceedings involving Indian children by certified mail, return receipt requested. This was supported by the stakeholders. However, ICWA and the BIA Guidelines require notice by registered mail, return receipt requested. Information received from the Legislative Council indicates that the state may be at risk of non-compliance with ICWA by allowing notice by certified mail. In addition, an analysis of the bill provided by the American Indian Law Clinic at the University of Colorado Law School, requested by the Wisconsin Office of the State Public Defender, also suggests that non-compliance could be an issue.

Registered
No choice -
that's what
ICWA says
AND require return receipt to be filed w/ct.

Workgroup Decision Item

Because of the issues noted above, the Workgroup has decided that notice should be by registered mail, return receipt requested. The Workgroup also decided that it would be beneficial for the return receipt to be filed with the court.

Existing Indian Family Doctrine

Some stakeholders objected to the language in the bill that would preclude a court in Wisconsin from considering the Existing Indian Family Doctrine, which essentially states that a court can consider whether a child has significant contacts with his or her tribe in determining whether the ICWA applies. The stakeholders argued that this should be left to the courts to consider "based on the facts of each individual case rather than being legislatively banned."

No!

This language was incorporated into the bill because case law clearly indicates that only tribes can determine their own membership. It also directly contradicts the clear language in ICWA defining "Indian child." A large majority of court decisions (approximately a 4 to 1 ratio) have not supported the Existing Indian Family Doctrine. Twenty-five (25) states have rejected it either judicially or legislatively. No state has supported it legislatively.

Workgroup Decision Item

The authority of tribes to determine their own membership is a paramount consideration in recognizing the sovereignty of tribes. In addition, the authority of a court to interpret a statute is commensurate with the lack of clarity in that statute. As such, the creation of public policy, the inherent authority of the legislative branch of government, should be as clear as possible to obviate the need for interpretation by the many circuit courts. The Workgroup will not recommend any change to the inclusion of this critical concept in the bill.

Best Interest

Define "Best Int of Ind. child" & distinguish from best int of non-Indian child by x-ref to 48.028 (1)(b) i.e., preventing out of home care or, if necessary, maintain cultural values

(g) *Active efforts standard.* The court may not order an Indian child to be placed in an out-of-home care placement unless the evidence of active efforts under par. (d)2. shows that there has been an ongoing, vigorous, and concerted level of case work beyond the level that typically constitutes reasonable efforts, as described in s. 48.355(2c). The court may not order an involuntary termination of parental rights to an Indian [child] unless the evidence of active efforts under par. (e)2. shows that there has been an ongoing, vigorous, and concerted level of case work beyond the level that typically constitutes an earnest and conscientious effort, as described in s. 48.415(intro). The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, and other individual Indian caregivers. The consideration by the court or jury of whether active efforts were made under par. (d)2. or (e)2. shall include whether all of the following activities were ~~considered and, if appropriate, offered or provided to the family~~.

No

~~Deleted:~~ conducted

1. Representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the Indian family's circumstances and to assist in developing a case plan that uses the resources of the tribe and of the Indian community, including traditional and customary support, actions, and services, to address the Indian family's circumstances.

2. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and their advice was actively solicited throughout the proceeding.

3. Extended family members of the Indian child were ~~notified and, to the extent possible, consulted with~~ to identify and provide family structure and support for the Indian child, ~~to assure cultural considerations~~, and to serve as placement resources for the Indian child.

4. Arrangement[s] were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.

~~5. Contact was made with extended family members of the Indian child to assure cultural connections.~~

6. All available family preservation strategies were employed and the involvement of the child's tribe was requested to assure such strategies are culturally appropriate.

7. Community resources offering housing, financial, and transportation assistance were identified, information about those resources was provided to the Indian family, and the Indian family was actively assisted in accessing those resources.

Formatted: Strikethrough

~~Deleted:~~ [~~Deleted:~~]~~Deleted:~~ culturally appropriate to the Indian child's tribe

offered or

or offered active assistance

Plus If any activity not conducted, document why activity not appropriate

Notice -- Joyce Kiel doc.txt

From: Kiel, Joyce [Joyce.Kiel@legis.wisconsin.gov]
Sent: Friday, November 21, 2008 12:27 PM
To: Mitchell, Mark S - DCF
Cc: Sappenfield, Anne - LEGIS
Subject: ICWA Draft

Thanks Mark.

Interesting to see the "Notice" provision in the Nebraska article says that while Nebraska law states that notice may be served by certified mail, ICWA mandates registered mail, return receipt requested, and the higher standard is to be applied. The article noted that another state's case law said that certified mail was not acceptable and a court order was reversed.

Here is the Q&A from the NARF ICWA publication:

"4.9 - How should notice be served?

Section 1912(a) provides that notice shall be sent by registered mail, with return receipt requested. The regulations governing the ICWA differ from the language of the statute as to the form of service. The regulations specify certified mail, return receipt requested. 25 C.F.R. 23.11(a), (d) (2007) (or personal service on the appropriate Area Director). Registered mail is a stricter standard than certified mail. Under 1921, the higher standard of protection should apply, so notice should be sent registered mail, return receipt requested. In addition, state law may well require personal service and that would be required by 1921."

I think you mentioned to me that some states have used the certified mail approach, as in the bill draft.

Since the issue hasn't been decided by a Wisconsin appellate court (or the 7th Circuit or the NINE), we don't know if a Wisconsin court would agree with the court decision referred to in the article or would hold the opposite. Thus, it seems like it is taking a bit of a chance to use the certified mail, return receipt requested, approach instead of the registered mail, return receipt requested, approach. Although, all things considered, it may be a chance that the workgroup is willing to take, given the cost of registered mail.

Has any thought been given to having the bill draft say: "by registered or certified mail, return receipt requested" so that the person giving notice can have the choice of how much of a chance they want to take and still be in compliance with state law if they opt to use the registered mail approach? I think that is what California did, e.g., in s. 180 (b) (1) in the CA Family Code and s. 224.2 (a) (1) of the CA Welfare and Institutions Code.

Just a thought. No response is necessary.

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-----Original Message-----

From: Mitchell, Mark S - DCF [mailto:Mark.Mitchell@wisconsin.gov]
Sent: Thursday, November 20, 2008 3:54 PM
To: Kahn, Carrie

Notice -- Joyce Kiel doc.txt

Cc: Collins, Kimmie L - DCF; Plona, Katie P - DHS; Sappenfield, Anne; Kiel, Joyce
Subject: Nebraska Article

Hi, Carrie. The link below will take you to the article I referenced in the meeting this morning re: ICWA being neglected.

<http://www.nebar.com/pdfs/nelawyer/2005/AUGUST/0805e.pdf>

--Mark

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